

LASA Employment and Workplace Relations update 2018



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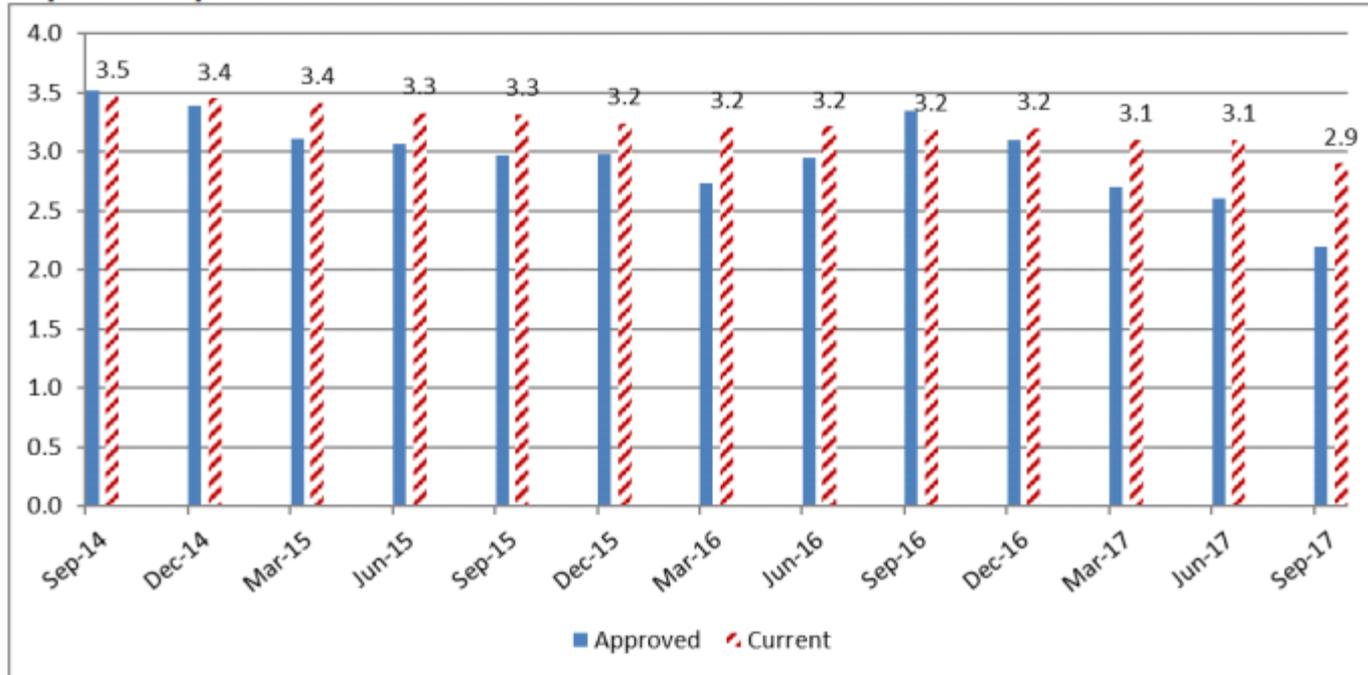
15 March 2018

- Enterprise Bargaining update – looking for reasons to bargain...?
- Labour Hire Licensing Act 2017 – commences **16 April 2018**

- Has stalled
- Is not seen to deliver sufficient benefits to off-set cost and risk
- Is impacted by modernised awards and impact of ERO on SCHCDS

Continued trends – low wages growth

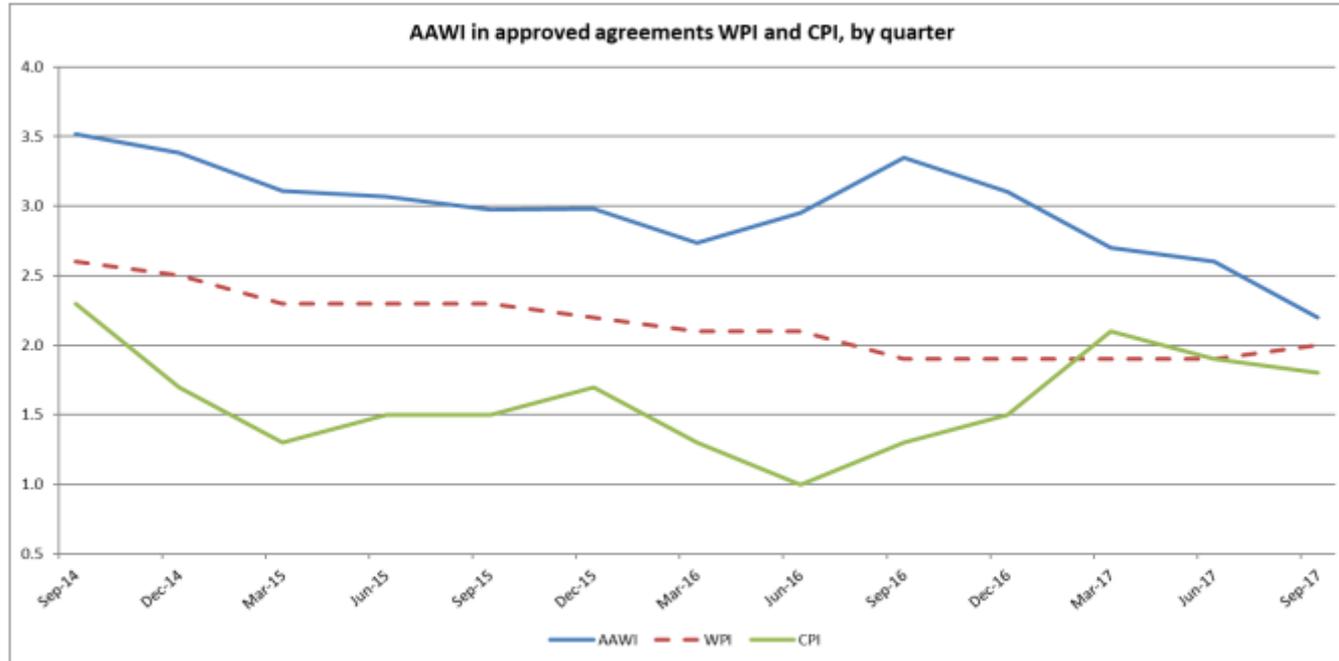
CHART 2: Approved and current agreements AAWI – September quarter 2014 to September quarter 2017



Source: Workplace Agreements Database, Department of Jobs and Small Business.

Continued trends – Wages mapping CPI

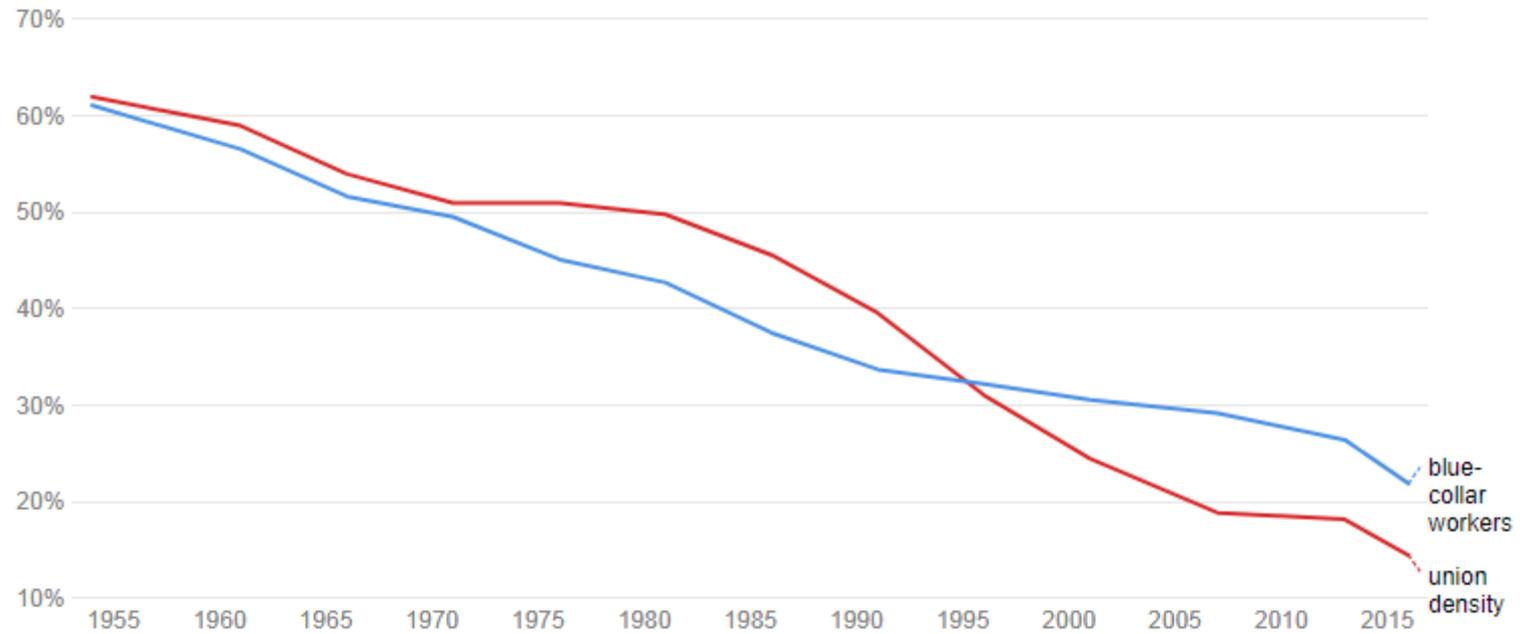
CHART 1: AAWI in approved agreements, per cent change in ABS Wage Price Index (WPI) and Consumer Price Index (CPI) – September quarter 2014 to September quarter 2017



Sources: Workplace Agreements Database, Department of Jobs and Small Business; Australian Bureau of Statistics Wage Price Index, Australia, Cat. No. 6345.0 – September 2017; Australian Bureau of Statistics - Consumer Price Index, Australia, Cat. No. 6401.0 – September 2017.

Union density continues to diminish

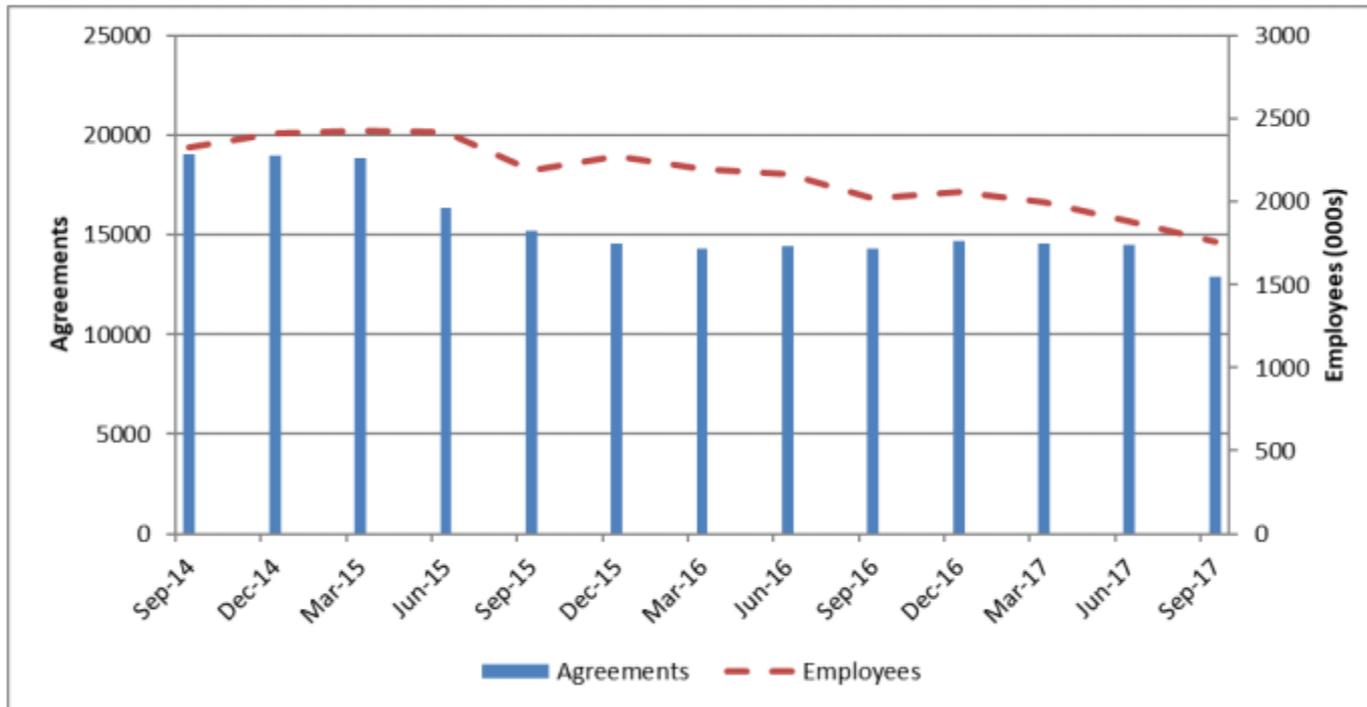
Union density and blue-collar workforce share, 1954-2016



Source: ABS, Cat. 610.0; ABS, Cat. 6325.1; ABS, Cat. 6310.0; ABS, Cat. 6333.0; Bowden et al, Work & Strife in Paradise, Appendix 21

Agreement coverage continues decline

CHART 4: Current agreements and employee coverage – September 2014 to September 2017



Source: Workplace Agreements Database, Department of Jobs and Small Business.

Background to slow demise of Enterprise bargaining

■ Obtain flexibility

- Awards since 2010 a feasible option - the pips have squeaked

"they have been simplified, rationalised, modernised and reviewed within an inch of their lives" (Sally McManus ACTU Secretary - January 2018)

- Coles; section 206 FWA and the use of Bolivian backpackers shows fundamental difference between the No Disadvantage Test and the BOOT

■ Increase certainty

- Less reliable subject of legislated and commission-inspired change

■ Eliminate industrial action

- for 95% of the Australian workforce it is not an issue

- Agreements covering 77,000 'wages paid' workers initially approved in July 2015
- Some terms more beneficial than Award and others less beneficial
- Approval decision was challenged by part-time worker and AMIEU in October 2015
- Argued
 - Agreement failed to pass the BOOT because despite higher hourly rates, lower penalty rates meant those who worked penalty shifts disadvantaged
 - Contingent entitlements insufficient to make up for reduced penalties
- Full Bench quashed decision to approve agreement

'... the application of the BOOT requires satisfaction, as at the test time, that each Award covered employee and each prospective employee would be better off overall under the Agreement.'

- Provide material showing how each employee will be better off overall
- Consider all employees, including small groups of employees who are not better off overall
- Be careful when offsetting monetary entitlements with contingent entitlements
- Ensure you know the cost of working **all rosters** under Award conditions – that is likely to be as low as you can go
- Operation of section 206 FW Act!

Bargaining and the Commission's 'triage' process

- Triage process - pilot program started in October 2014
- Expanded to all agreements in late 2016
- Before pilot
 - 74% agreements approved without undertakings
 - 4% withdrawn
- First six months 2017
 - 39% agreements approved without undertakings
 - 17% withdrawn

■ Movement from union is clear:

- *reform* enterprise bargaining
 - easier to start industrial action
 - more difficult for employers to take action
- explore 'living wage' option legislating increases
- more intervention in legislation controlling structure of industrial relations
 - Labour hire legislation
 - Industrial manslaughter
- but less legislative intervention on
 - basic NES terms and conditions
 - employee/union industrial action



- Labour Hire Licensing Act 2017 – commences **16 April 2018**
- From 16 April 2018 - 60 days to apply for a licence
- Regulations still to be released – much detail to come

What is the purpose of the Act?

- (a) Protect workers from exploitation by **providers** of **labour hire services**
 - (b) Promote the integrity of the labour hire industry
-
- Achieved by establishing licensing scheme to regulate provision of labour hire services

Who is a ***provider of labour hire services?***

- A person who
 - in the course of carrying on a business,
 - supplies, to another person, a worker to do work

- Regulations can carve out persons (or classes) if supply of workers is not dominant purpose of business
 - None drafted as yet

Who is a **worker**?

- An individual who enters into an arrangement with a provider under which
 - the provider may supply the individual to another person to do work **AND**
 - the provider is obliged to pay the worker for the work

- Exceptions to be prescribed by regulation
 - None drafted as yet

What it could capture

- 'Genuine' secondments
- Consultants
- Worker is 'director' or 'owner' of business
- Corporate group / employing entity
- Workers supplied in a domestic setting (not to a business or undertaking)

- 'Genuine' secondments – **regulation**
- Consultants – **regulation**
- Worker is 'director' or 'owner' of business – **regulation**
- Corporate group / employing entity – **apply to regulator**
- Workers supplied in a domestic setting (not to a business or undertaking)
 - **policy and regulation**

- Providing labour hire services without licence
- **Using unlicensed providers**
- Entering arrangements to circumvent or avoid obligations
- Maximum penalties
 - Individual - \$130,439.10* or 3 years imprisonment
 - Corporation - \$378,450*

Also note that if a client is aware, or ought reasonably be aware of an *avoidance arrangement*, the client must report it

*penalty unit value from 1 July 2017

- Made in the approved form
- State the *nominated officer* for the business
- Information about whether the business will provide accommodation or any other service (i.e. meals)
- Details of any disciplinary action taken by a regulatory body under a **relevant law** within the last 5 years
- Applications will be published on website **allowing public to make comments on the application**

- Each of the following are fit and proper persons
 - each applicant
 - the nominated officer
 - if applicant is a corporation
 - the corporation
 - **each executive officer (any person who is concerned, or takes part, in the management of the corporation)**

- Business is financially viable

- Person's character (e.g. honesty, integrity and professionalism)
- Person's history of compliance with relevant laws or demonstrable ability to comply with relevant laws
- Has the person previously held a licence that has been cancelled or suspended, or had conditions imposed
- Has the person been convicted of an offence against a relevant law or another law that affects the person's suitability to provide labour hire services

■ Documents

- Independent auditor/accountant reports
- Evidence of payments to ATO, super funds, WorkCover
- Tax returns
- Statements of financial position, P&L, cash flow
- ATO self-assessment
- Business plans
- Bank statements
- Evidence of line of credit
- Parent company or investor guarantees
- PL/PI and other insurances

- Suspension or cancellation if
 - the licensee has given materially incorrect or misleading information in a report
 - the licence was obtained, renewed or restored because of materially incorrect or misleading information
 - the licensee has contravened a condition of the licence
 - the licensee is no longer a fit and proper person to provide labour hire services
 - the licensee or an employee or representative of the licensee has contravened a relevant law, whether or not they have been convicted of an offence for the contravention
 - business no longer financially viable (suspension)
 - if the licensee is insolvent or wound up / deregistered (cancellation)

Suspension, cancellation and surrender

- Public can lodge complaints about a licensee
- 'show cause' process - 14 days to provide response to reasons
- If licence is cancelled, the entity (and associated entities) cannot re-apply for two years
- Unclear to what extent an employee or representative of the licensee contravening a relevant law will be held against the company

Entry powers

- Powers to enter places (including a residence) and obtain information
- Upon entry, and inspector can search any part of the place, inspect and copy records
- Inspectors can require reasonable help when exercising their powers

Power to require documents

- Inspectors can require a person to provide documents
- Cannot fail to provide a document even if complying might tend to incriminate the person or expose the person to a penalty

- Clients who become aware of an avoidance arrangements must report the non-complying person
- Failure to report has a maximum penalty of \$25,230 for an individual, \$126,150 for a corporation
- Effectively compels a person to report their breach of section 12 and therefore exposes them to penalty under that section

- Liability for any person procures or aids the commission of an offence
- The person is taken to have committed the offence and is liable for the penalty prescribed by that offence
- Essentially an 'aiding and abetting' provision
- Officers of the corporation the likely target

- Licensee or an *interested person* can apply for review of any decision by the chief executive to grant or suspend a license, or impose vary or revoke a condition on a licence
- An interested person could be
 - a union
 - employer/industry organisation, or
 - anyone who has an interest in the protection of workers or the integrity of the labour hire industry
- An interested party has 28 days from when they 'otherwise become aware of a decision' to apply for review
- Apply to QCAT for a stay

- In practice a licensee could be subject to an unlimited number of appeals by any number of interested parties throughout the one year period of the licence
- Doesn't need to be a decision to suspend/cancel a licence, could be the decision not to suspend/cancel
- Chief executive has 21 days to make review decision

- Focus on enshrining the traditional employment relationship as only vehicle for work
- Increased capacity for union to enable industrial action during and outside bargaining
- Introduction of bargaining fees for unions?
- A living wage tied to 60% of the median wage.



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